Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1976

76-1641

EDMUND A. ROSNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

EDMUND A. ROSNER,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Edmund A. Rosner, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 1, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, J., denying petitioner's motion to vacate or correct the sentence imposed upon conviction for conspiracy, obstruction of justice and bribery, is reported at 549 F.2d 259 and is printed in Appendix A, *infra*, at pp. 1a-9a. The orders of the Court of Appeals denying a petition for rehearing containing a suggestion that the action be reheard en banc are printed in Appendix B, *infra*, at pp. 10a-11a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 1, 1977. A timely petition for rehearing containing a suggestion that the action be reheard en banc was denied on April 22, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Must a sentence which was influenced in its formulation, at least in part, by a prior sentence which was vacated on appeal because petitioner's counsel was not given sufficient time to rebut a memorandum received from the United States Attorney which contained allegations of other misconduct on the part of petitioner which the initial sentencing judge considered in formulating the sentence he imposed, be vacated, where upon resentence petitioner's counsel was again denied an opportunity to rebut the allegations of other misconduct contained in the initial sentencing memorandum?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution and Fed. R. Crim. P. 35 and 28 U.S.C. §2255, the pertinent text of which is set forth in Appendix C at pp. 12a-14a.

STATEMENT

On December 5, 1972, petitioner was convicted in the United States District Court for the Southern District of New York of the crimes of conspiracy, 18 U.S.C. §371, obstruction of justice, §18 U.S.C. §§1503 and 2, and three counts of bribery, 18 U.S.C. §§201(b) and 2 and 3227. His conviction followed a jury trial before the Hon. Arnold

Bauman, U.S.D.J. After hearings on two separate motions for a new trial, petitioner was sentenced to concurrent terms of five years imprisonment. On appeal, his conviction was affirmed but the sentence was vacated and the case remanded for resentencing by another judge, 485 F.2d 1213 (2d Cir. 1973). No mandate issued, however, pending a petition for a writ of certiorari. While that petition was still pending, petitioner moved for a new trial based on newly discovered evidence that the government's main witness, Detective Robert Leuci, had committed flagrant and massive perjury at his trial concerning the extent of his own prior criminal misconduct. This court denied certiorari without prejudice to the district court's consideration of the motion for a new trial, 417 U.S. 950 (1974). After a hearing, Judge Bauman denied the motion in an unreported opinion. On appeal the denial of the new trial motion was affirmed, 516 F.2d 269 (2d Cir. 1975). Certiorari was denied on June 30, 1976, 427 U.S. 911. Petitioner filed a timely petition for rehearing and on October 4, 1976, this Court requested the Solicitor General to respond to the petition for rehearing, 97 S.Ct. 49. On November 29, 1976, the petition for rehearing was denied, Justice Marshall noting his dissent, 97 S.Ct. 513. On August 16, 1974, the Hon. Inzer B. Wyatt, U.S.D.J., who had been assigned to resentence petitioner, imposed concurrent sentences of three years imprisonment on each count. On August 26, 1976, petitioner moved for a reduction of sentence pursuant to Fed. R. Crim. P. 35. This motion was denied on September 13, 1976. On September 26, 1976, petitioner filed a motion to vacate the August 16, 1974 sentence pursuant to Fed. R. Crim. P. 35 and 28 U.S.C. §2255 and to reassign the case for resentencing before another judge. On October 1, 1976, Judge Wyatt denied this motion. On February 1, 1977, the Court of Appeals for the Second Circuit affirmed, 549 F.2d 259. On April 22, 1977, a petition for rehearing containing a suggestion that the action be reheard en banc was denied.

On appeal petitioner argued that the sentence imposed by Judge Wyatt was illegal because in imposing sentence Judge Wyatt specifically took into consideration Judge Bauman's prior sentence which was vacated by the Court of Appeals because petitioner's counsel was not given sufficient time to rebut a memorandum received from the United States Attorney which contained allegations of other misconduct on the part of petitioner which Judge Bauman considered in formulating the sentence he imposed. Before imposing sentence Judge Wyatt stated:

> "I have taken into account, as a factor, Judge Bauman's sentence and I disagree with Mr. Dershowitz's memorandum that no weight whatever can be given to Judge Bauman's sentence.
>
> I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me in arriving independently at a sentence now to be imposed." (A26-7)*

The Court of Appeals affirmed, ruling that where, as here, the case had been remanded, not because Judge Bauman's reliance on the prosecutor's sentencing memorandum was per se improper, but because counsel was not given an opportunity to rebut the allegations of other wrongdoing contained in the memorandum, Judge Wyatt had the discretion to consider the initial sentence and his consideration of it did not vitiate the sentence he imposed, where "Rosner had every opportunity to controvert the charges of the original government memorandum and to urge Judge Wyatt to abjure reliance on the initial sentence which might have been based in part on the memorandum." 549 F.2d at 263.

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*Numbers in parentheses preceded by an "A" refer to pages in Appellant's Appendix in the Court of Appeals.

The court's opinion appears inconsistent with the record facts that Rosner's counsel explicitly urged Judge Wyatt to abjure reliance on Judge Bauman's initial sentence (A54, 26-7), and only failed to contradict the allegations in the initial government sentencing memorandum because Judge Wyatt in a proceeding on July 1, 1974, explicitly told him not to:

> The Court: "You don't need to respond to it, because I have never seen it, and I don't have it, and I don't want it."

(Transcript of proceedings, July 1, 1974, p. 10.)

The court also concluded that Judge Wyatt reached his determination "independently." See, 549 F.2d at 264, N.7. This conclusion appears to be inconsistent with Judge Wyatt's statement on the record, that in arriving at a sentence to be imposed on Rosner he gave weight to Judge Bauman's prior sentence.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS.

This Court has held that due process requires that a defendant be resentenced where the court considered misinformation in imposing sentence, such as an inaccurate criminal record, *Townsend v. Burke*, 334 U.S. 736 (1948), or where the sentencing court considered a prior unconstitutional conviction, *United States v. Tucker*, 404 U.S. 443 (1972). Courts of Appeals outside the Second Circuit have uniformly held that a defendant must be resentenced where his sentence was either based on misinformation or *was imposed without affording him an opportunity to rebut derogatory information considered by the court in imposing sentence. United States v. Looney*,

501 F.2d 1039 (4th Cir. 1974); *United States v. Powell*, 487 F.2d 325 (4th Cir. 1974); *Gill v. Estelle*, 530 F.2d 461 (5th Cir. 1976); *Garrison v. United States*, 524 F.2d 920 (5th Cir. 1975); *Collins v. Buchkoe*, 493 F.2d 343 (6th Cir. 1974); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *Farrow v. United States*, ——F.2d——, 20 Cr. L. 2121 (9th Cir. 1976); *Martinez v. United States*, 464 F.2d 1289 (10th Cir. 1972); *United States v. Hopkins*, 531 F.2d 576 (D.C. Cir. 1976). This Court recently ruled in *Gardner v. Florida*, ——U.S.——, 97 S.Ct. ——, 51 L.Ed. 2d 393 (1977) that in capital cases due process requires that a defendant be given an opportunity to rebut any derogatory information in a presentence report considered by the court in imposing sentence. Due process would appear to mandate the application of this rule to sentencing in any criminal case where one's liberty is placed in jeopardy. Compare *Gideon v. Wainwright*, 372 U.S. 37 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The Court of Appeals sought to distinguish the cases upon which we relied below on the ground that "in those cases remand was based upon misinformation and not the lack of opportunity to rebut it." 549 F.2d at 262, N.3. This limitation by the Second Circuit of the due process right to resentencing to only those defendants whose sentences were based on misinformation, directly conflicts with decisions in other circuits and applicable decisions of this Court. The Sixth Circuit in *Collins v. Buchkoe, supra*, and the Fourth Circuit in *United States v. Looney, supra*, have specifically ruled that due process requires the resentencing of any defendant who was not "afforded the opportunity of rebutting derogatory information demonstrably relied upon by the sentencing judge, when such information can in fact be shown to have been materially false." *Collins v. Buchkoe, supra*, at 345.

In addition, we submit that where, as here, a defendant claims that allegations of other wrongdoing contained in a prosecutor's initial sentencing memorandum are false and unfounded, and the defendant upon remand has again been denied an opportunity to controvert those allegations, as occurred here (Transcript of Proceedings, July 1, 1974, p. 10), then for appellate purposes, those allegations must be presumed to be misinformation, and where as here, the record shows that the initial tainted sentence influenced the formulation of the new sentence (A26-7), then the cases we relied upon below, even accepting the Second Circuit's unprecedented limitation, are directly in point. See *Collins v. Buchkoe, supra*.

It is conceded that petitioner was denied an opportunity to rebut the prosecution's pre-sentence memorandum by Judge Bauman, the original sentencing judge, and petitioner's resentence was ordered on this ground. Judge Wyatt, who resentenced petitioner, told petitioner's counsel that he did not have and would not consider the memorandum and that therefore counsel should not reply to it. Then in imposing sentence, Judge Wyatt stated on the record that he was giving weight to Judge Bauman's sentence, which was influenced in its formulation by the prosecutor's unrebutted pre-sentence memorandum. Clearly, petitioner was denied due process since for the second time he was not afforded an opportunity to rebut derogatory information which may have had an indirect effect upon the formulation of the sentence Judge Wyatt imposed upon him. That petitioner has been prejudiced by the denial of an opportunity to rebut this information may be inferred from the fact that the three year sentence of imprisonment imposed by Judge Wyatt exceeds the one year sentenced imposed on his indisputably more culpable codefendants, and the statistical mean sentence of less than two years typically imposed in cases similar to petitioner's (A54-64).

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

ALAN DERSHOWITZ, ESQ.
J. JEFFREY WEISENFELD, ESQ.
Attorneys for Petitioner

APPENDIX A

UNITED STATES of America, Appellee,

v.

Edmund A. ROSNER,
Defendant-Appellant.

No. 644, Docket 76-1483.

United States Court of Appeals,
Second Circuit.

Argued Jan. 12, 1977.

Decided Feb. 1, 1977.

Jeffrey I. Glekel, Asst. U.S. Atty. (Robert B. Fiske, Jr., U.S. Atty., S.D.N.Y., Frederick T. Davis, Asst. U.S. Atty., New York City, of counsel), for appellee.

J. Jeffrey Weisenfeld, New York City (Alan M. Dershowitz, Cambridge, Mass., Nancy Rosner, Elliot A. Taikeff, New York City), for defendant-appellant.

Before KAUFMAN, Chief Judge, and SMITH and MULLIGAN, Circuit Judges.

MULLIGAN, Circuit Judge:

On December 5, 1972 Edmund A. Rosner, an attorney, was convicted in the United States District Court for the Southern District of New York of the crimes of conspiracy, 18 U.S.C. §371, obstruction of justice, 18 U.S.C. §§1503 and 2, and three counts of bribery, 18 U.S.C. §§201(b) and 2, and 3237. His conviction followed an elevey-day jury trial before Hon. Arnold Bauman, *United States District Judge.* After hearings on two separate motions for a new trial, Rosner was sentenced on March 20, 1973 to concurrent terms of five years imprisonment. His conviction was affirmed by this court on September 26, 1973, 485 F.2d 1213, but the sentence was vacated. The case was remanded for resentencing by another judge on grounds which will be

discussed later in this opinion. No mandate issued, however, pending Rosner's petition for a writ of certiorari. While that petition was still pending, Rosner moved for a new trial based on newly discovered evidence. on June 10, 1974, the Supreme Court denied certiorari without prejudice to the district court's consideration of the motion for a new trial. 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672. After two hearings on the motion for a new trial, Judge Bauman on August 15, 1974, denied the motion in an unreported opinion. The denial of the motion for a new trial was appealed and was affirmed by this court on April 29, 1975. *United States v. Rosner,* 516 F.2d 269. Certiorari was denied on June 30, 1976, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203, and the petition to rehear its denial was denied on November 29, 1976. ——U.S.——, 97 S.Ct. 513, 50 L.Ed.2d ——.

On August 16, 1974, Hon. Inzer B. Wyatt, United States District Judge, Southern District of New York, who had been assigned to resentence Rosner, imposed concurrent sentences of three years imprisonment on each count. On August 27, 1976, Rosner moved for a reduction of sentence pursuant to Fed.R.Crim.P. 35. This was denied by the district court on September 3, 1976. On September 26, 1976, Rosner filed the present motion to vacate the August 16, 1974 sentence pursuant to Fed.R.Crim.P. 35 and 28 U.S.C. §2255 and to reassign the case for resentencing before another judge. Judge Wyatt denied this motion by order dated October 1, 1976. This appeal followed.[1] We affirm.

In Judge Gurfein's opinion for this court in *United States v. Rosner, supra,* 485 F.2d at 1229-31, the reason for resentencing Rosner is clearly articulated. Judge Bauman had received a lengthy memorandum from the United States Attorney's office, admittedly not screened by the Probation Department, which outlined some 17 charges of additional "possible misrepresentations, fraudulent

conduct, lying, and unethical behavior" on the part of Rosner. The United States Attorney's office conceded that it was impossible to prove all of these charges. This memorandum had been held *in camera* by the judge for over two months. Judge Bauman stated on the day of sentencing that he was taking into consideration the prosecutor's memorandum but it was not given to Rosner's counsel until that morning. Counsel thereupon requested an adjournment so that he might have the opportunity to answer the charges in the memorandum. The adjournment was denied. We concluded on appeal that counsel should have been given a continuance in order to have a reasonable opportunity to rebut the adverse information contained in the prosecution memorandum.[2]

Judge Gurfein stated in conclusion:

> In resentencing, the judge redrawn will either not consider the prosecutor's report, or if he deems it desirable to read it, will afford a reasonable opportunity, in advance of sentencing, to defense counsel to attempt to refute its accusations. We do not, however, order an evidentiary hearing. *Williams v. New York, supra* [337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337]. Nor do we make any suggestion regarding the appropriate sentence.
>
> The conviction is affirmed; the sentence is vacated and the case is remanded for resentencing in conformity with this opinion.

Id. at 1231 (footnote omitted).

The appellant's sole point upon this appeal is that Judge Wyatt's sentence is illegal because in imposing it he considered Judge Bauman's prior illegal sentence. At the time of sentence Judge Wyatt stated, "I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me in arriving independly at a sentence now to be imposed." Appellant

argues that since Judge Bauman's sentence was vacated by this court it was illegal and any reliance upon it vitiates the new sentence. The argument is neither convincing nor persuasive.

As Judge Gurfein's opinion makes clear, we remanded the case not because Judge Bauman's reliance on the government's sentencing memorandum was per se improper but simply because Rosner's counsel was not given the opportunity to rebut the 17 extraneous allegations of other wrongdoing it contained. Any possible doubt about this must be dispelled by our direction to the resentencing judge that "[he] will either not consider the prosecutor's report, or if he deems it desirable to read it, will afford a reasonable opportunity, in advance of sentencing, to defense counsel to attempt to refute its accusations." Id. at 1231. Thus it is crystal clear that we did not consider the prosecutor's memorandum as a document not to be employed on resentencing but explicitly gave the resentencing judge discretion to read it conditioned only upon his affording Rosner's counsel the opportunity to rebut its allegations.[3]

Of course, it is conceded that Judge Wyatt did not read or depend directly on the initial government memorandum. Indeed, the procedures followed on resentencing were exemplary. He carefully indicated what he had considered in fixing the sentence — the opinion of the Court of Appeals, the presentence reports of the Probation Department, the sentencing memoranda of the government and the defendant. The government's memorandum filed on November 27, 1973, two months after our remand, was obviously in the hands of defense counsel before resentencing since Rosner's sentencing brief makes reference to it. Rosner's counsel in fact made no effort and sought no opportunity to controvert the contents of the earlier report even though the entire basis for our remand was the previous lack of opportunity for rebuttal. It may well be

that this reticence was strategically sound since any further exploration of the charges it made might have exacerbated the posture of his client. Rosner claimed in his sentencing memorandum that the second government report contained false allegations with respect to four unrelated matters as well as a charge that after his trial Rosner attempted to "infiltrate" the United States Attorney's office by sending someone to speak to an Assistant while wearing a recording device. Interestingly, Rosner's memorandum does not deny the incident but objects to its characterization as "infiltration" and would prefer to term it as a legal and ethical attempt to preserve evidence.[4] Aside from terming the other extraneous material as false no effort was made to rebut or dispute the accuracy of the statements. There is no issue raised here with respect to the second government report. None in fact could be made on this appeal since Judge Wyatt stated on sentencing, "I have not taken into account in now formulating a sentence the so-called Joe Jacobs incident [the use of the recording device] or the four so-called unrelated matters; that is, I think the defendant's sentencing memorandum calls them unrelated matters. I have not passed on them one way or the other. I simply have not taken them into account."

[1,2] Judge Wyatt was concerned, however, to assess the seriousness of Rosner's offense, particularly since the degree of Rosner's culpability was bitterly contested. He was severely handicapped in this essential task because he had not heard the evidence presented at trial. Accordingly, he relied on Judge Bauman's view, expressed in the initial choice of a five-year sentence, that Rosner's offense was indeed a serious one. Rosner had every opportunity to controvert the charges of the original government memorandum and to urge Judge Wyatt to abjure reliance on the initial sentence, which might have been based in part on the memorandum. This he has utterly failed to do. Instead, his present appeal is reduced to the bald

proposition that the new sentence is vitiated per se by Judge Wyatt's consideration of Judge Bauman's prior sentence. However, there has been a total failure to establish that Judge Bauman did rely on information which was in fact false. It is well established that the sentencing judge may take into consideration reports based on hearsay and is not at all limited to a consideration of those facts upon which the defendant was convicted by the jury.[5] Judge Wyatt under the circumstances described here, had the discretion in our view to consider Judge Bauman's initial sentence. Any question about this again evanesces when we consider the previously quoted comments of Judge Wyatt when he stated that Judge Bauman's sentence would be one of many factors to be considered. He continued:

> I consider Judge Bauman one of the ablest judges to have graced this court and I have for him the highest respect, but I have reached independently — now that I have heard finally the submissions this afternoon, I have reached independently a conclusion as to sentence.
>
> I find, as might have been expected, that I agree with Judge Bauman as to the seriousness of the offenses and that imprisonment is required.
>
> Taking into account that Mr. Rosner, the defendant, has lost, and if the conviction becomes or is final, will irrevocably lose his license to practice law, and taking into consideration all the other factors to which Mr. Dershowitz has directed my attention in the memorandum and this afternoon, I do disagree with Judge Bauman as to the length of imprisonment which should be required.

He then proceeded to sentence Rosner to three years on each count to be served concurrently, a substantial reduction from the initial five-year sentence of Judge Bauman.

[3,4] Thus it becomes apparent that while Judge Wyatt agreed with Judge bauman that imprisonment was necessary in view of the serious nature of the criminal acts of Rosner, he disagreed with the length of the initial sentence and cut it substantially. Thus Rosner has shown no prejudice. Moreover, he emphasized that he reached this conclusion independently and there is no reason at all for this court not to take him at his word. Judge Wyatt, in any event, could not avoid knowing what initial sentence had been imposed. It was set forth in our opinion which he had read — it thus becomes virtually impossible for a resentencing judge to be unaware of the initial sentence. As long as the sentence he imposes does not depend upon the improper criteria which vitiated the first sentence, the new sentence is unassailable provided it is within the statutory limits.

[5] A reading of the sentencing minutes here makes it patent that Judge Wyatt conscientiously and meticulously followed the remand of this court and that he carefully enumerated the reasons which prompted him to set a more lenient sentence. We have often expressed our view that a sentencing judge, although not mandated, should provide a statement of his reasons for imposing sentence. *United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976); *United States v. Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973); Second Circuit Committee on Sentencing, Sentencing Procedures, 3 (Jan. 1976).[6] Judge Wyatt followed that suggestion here and we find no error in the procedure he adopted and no dependence upon improper criteria. The history of this case reveals that Rosner has been afforded every opportunity for judicial review and reconsideration at every level. This court has remanded once for resentencing to provide him the opportunity to establish that Judge Bauman relied upon false and misleading information. In the intervening three years and four months there has been no attempt to establish that the court had

relied on anything improper.[7] For the reasons given, Judge Wyatt's sentence is not vulnerable. It is appropriate that this litigation cease at some point and we believe that this time has now arrived.

Affirmed.

FOOTNOTES TO APPENDIX A

1. From the time of his conviction on December 5, 1972 and until the disposition of this appeal Rosner has continuously remained at liberty pursuant to orders of this court. When sentenced by Judge Wyatt on August 16, 1974 the government did not oppose his continuance on bail on the representation of Rosner's attorney that an appeal from his sentence would be filed "as expeditiously as possible." The motion to vacate the sentence was not made until more than two years later—September 26, 1976.

2. Judge Bauman also considered on sentencing a presentencing report of the Probation Department not previously requested by Rosner. While recognizing that the government was not required to have revealed the contents of the presentence report to Rosner and that vacation of the original sentence was not required, *United States v. Holder*, 412 F.2d 212, 215 (2d Cir. 1969), we nonetheless vacated the sentence because of the adversary government memorandum which he also considered but which Rosner had no reasonable opportunity to controvert. *United States v. Rosner, supra*, 485 F.2d at 1231.

3. This point distinguishes all of the cases cited by Rosner where a sentence was vacated because of reliance upon factors which were clearly improper. In those cases remand was based on misinformation and not the lack of opportunity to rebut it. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d 592 (1972) (reliance on constitutionally invalid earlier convictions); *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) (inaccurate criminal record); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976) (misapprehension as to material facts); *United States v. Rivera*, 521 F.2d 125 (2d Cir. 1975) (remanded for resentencing on two counts to insure sentence imposed on them not influenced by sentence on reversed count); *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972) (one of four counts on which defendant was sentenced concurrently was invalid; remanded for resentencing on other three counts without consideration of invalid one); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970) (inaccurate criminal record).

4. The Rosner memorandum accuses the United States Attorney's office of "incredible arrogance" in terming this incident as "infiltration" considering that so much of the case against Rosner rested on the use of "secret recordings."

5. We have held that "[a] sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him].' *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84 (1965)." *United States v. Schipani*, 435 F.2d 26, 27 (2d Cir. 1970), cert. denied, 401 U.S. 983, 91 S.Ct. 1198, 28 L.Ed.2d 334 (1971). Accord, *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972) (Before sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") Hearsay, although not admissible at trial, may be considered by the sentencing judge. *United States v. Seijo*, 537 F.2d 694, 700 n. 7 (2d Cir. 1976); *United States v. Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972); *United States v. Tortora*, 464 F.2d 1202, 1208 n. 4 (2d Cir.), cert. denied, 409 U.S. 1063, 93 S.Ct. 554, 34 L.Ed.2d 516 (1972); see *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); 2 C. Wright, Federal Practice & Procedure §526.

6. Sentencing Procedures III provides in part:

> C. *The Sentencing Hearing*
> When sentence is imposed, the court should:
> 2. Make specific findings on controverted issues which the court intends to consider in imposing sentence.
> 3. State for the record, in the presence of the defendant, the reasons for the particular sentence imposed and for rejecting available sentencing alternatives. . . .

Second Circuit Committee on Sentencing, Sentencing Procedures (Jan. 1976).

7. In his petition for rehearing Rosner's counsel explains that the defense failed to contradict the allegations in the initial government sentencing memorandum because Judge Wyatt had informed them that he would not rely on that memorandum in formulating a new sentence. This cuts across Rosner's argument that somehow his second sentence is tainted by the initial memorandum and supports our conclusion that Judge Wyatt reached his determination independently.

APPENDIX B

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nin-hundred and seventy-seven.

Present: Hon. IRVING R. KAUFMAN,
Chief Judge,
HON. J. JOSEPH SMITH,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

-v-

Edmund A. Rosner,
Defendant-Appellant.

76-1483

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

United States of America,
Plaintiff-Appellee,

v

Edmund A. Rosner,
Defendant-Appellant.

76-1483

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX C

U.S. Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure

Rule 35.
Correction or Reduction of Sentence

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

28 U.S.C. §2255

Federal custody; remedies on motion attacking sentence

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Supreme Court, U. S.
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No. 76-1641

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDMUND A. ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court improperly considered his original sentence, which had been vacated by the court of appeals, in determining a new sentence on remand.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371, obstruction of justice, in violation of 18 U.S.C. 1503 and 2, and three counts of bribery, in violation of 18 U.S.C. 201(b) and 2. He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed the conviction, but it vacated the sentence and remanded for resentencing by another

judge. 485 F. 2d 1213, certiorari denied, 417 U.S. 950 (Pet. App. 1a-2a).[1]

The court of appeals ordered a resentencing because, in fixing petitioner's original sentence, the district court had relied in part on a lengthy sentencing memorandum from the United States Attorney that had outlined some 17 additional allegations of misconduct by petitioner, many of which admittedly were impossible of formal proof. Although the district court had been in possession of the memorandum for several weeks, petitioner only became aware of it on the date of sentencing. Nonetheless, petitioner had been denied a continuance to study the document, and as a result he was unable to rebut its allegations. The court of appeals directed the resentencing judge either to decline to read the memorandum or, if he thought it useful to consult the document, to permit petitioner an opportunity to rebut it (Pet. App. 2a-4a).

On remand, the district court chose not to read or rely on the memorandum. Rather, it considered the presentence report from the probation authorities, the opinion of the court of appeals, and a second sentencing memorandum prepared by the government. In addition, the court took into account petitioner's original sentence of five years' imprisonment because it believed that the first sentence was "one of the many factors to be considered * * * in arriving independently at a sentence * * *" (Pet. App. 3a). Based upon all of these factors, the court sentenced petitioner to concurrent terms of three years' imprisonment on each count (*id.* at 2a).

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[1]Petitioner also moved for a new trial while his direct appeal was pending on petition for a writ of certiorari. The district court denied the motion, the court of appeals affirmed (516 F. 2d 269), and this Court denied review (427 U.S. 911).

Petitioner thereafter moved to vacate or reduce his sentence pursuant to Rule 35, Fed. R. Crim. P., and 28 U.S.C. 2255, contending that the sentence imposed on remand was illegal because the resentencing judge had considered the length of the original sentence. The district court denied the motion and the court of appeals affirmed (Pet. App. 1a-9a).

2. Petitioner contends that he was denied due process because the district court on remand relied to some extent on petitioner's original sentence, which had been influenced by "the prosecutor's unrebutted pre-sentence memorandum" (Pet. 7). As the court of appeals noted (Pet. App. 4a), however, "we remanded the case not because [the sentencing judge's] reliance on the government's sentencing memorandum was per se improper but simply because [petitioner's] counsel was not given the opportunity to rebut the 17 extraneous allegations of other wrongdoing it contained." On remand, the district court refused to read the sentencing memorandum, a refusal that eliminated any possibility of a recurrence of the error that had infected petitioner's initial sentencing and that (as the court below remarked) "supports our conclusion that [the resentencing judge] reached his determination independently" (*id.* at 9a, n. 7).

The fallacy of petitioner's argument is that it equates consideration of the length of his original sentence with consideration of the original sentencing memorandum, although the first sentence imposed on petitioner obviously was the product of a great many other factors on which the district court on remand was entitled to rely. Since the resentencing judge did not read the original sentencing memorandum and considered the original sentence only for the purpose of assessing the trial judge's belief in petitioner's culpability (Pet. App. 5a), the court of appeals correctly rejected petitioner's claim as nothing more than the "bald proposition that the new sentence

[was] vitiated per se by [the resentencing judge's] consideration of [the] prior sentence" (*id.* at 5a-6a).[2] Indeed, since the second sentence imposed on petitioner represented a substantial reduction of the first sentence, any contention that the resentencing judge was indirectly influenced by the original sentencing memorandum is particularly unpersuasive. In sum, the court of appeals properly concluded that the district court "conscientiously and meticulously followed the remand of this court and that [it] carefully enumerated the reasons which prompted [it] to set a more lenient sentence. * * * [W]e find no error in the procedure [it] adopted and no dependence upon improper criteria" (*id.* at 7a).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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[2]If petitioner believed, contrary to the district court's representations, that the original sentencing memorandum was being considered on remand, he had more than a year to examine the memorandum and to indicate its alleged inaccuracies.

[3]Although petitioner suggests that the decision below is inconsistent with decisions of other circuits (Pet. 5-6), each of the cases on which he relies involved either the use of misinformation of constitutional magnitude (see, *e.g.*, *United States* v. *Tucker*, 404 U.S. 443) or a lack of opportunity by the defendant to rebut information on which the court had relied in imposing sentence (see, *e.g.*, *Collins* v. *Buchkoe*, 493 F. 2d 343 (C.A. 6)). The district court in this case relied exclusively upon legitimate sources of information to which petitioner had a full opportunity to respond.

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